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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted]211

A. L. BROWN,
Petitioner

vs.

GENERAL MOTORS CORPORATION,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1965

No. 1393

A. L. BROWN,
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vs.

GENERAL MOTORS CORPORATION,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

STATUTES

Ohio Revised Code (Uniform Sales Law, effective in Ohio until July 1, 1962): § 1315.13. Express Warranty (G. C. §8392); §1315.16. Sale in Which Warranty is Implied (G. C. § 8395). Appendix p. 26.

North Carolina General Statutes, Ch. 1, Sub.-Ch. II, Limitations, Art. 5, G. S. 1-52 (1). Appendix p. 27.

QUESTIONS PRESENTED

It is respectfully suggested that the petitioner has not correctly stated the questions presented and that the correct questions are as follows:

(1) Are there any special or important reasons for granting a review on writ of certiorari in this case?

(2) Did the Court of Appeals correctly rule that the evidence was insufficient in law to establish liability in negligence?

(3) Did the Court of Appeals correctly rule that the evidence was insufficient in law to establish liability on warranty?

STATEMENT OF FACTS

1. Preliminary Statement

The petitioner's statement of "facts", which is almost the identical statement he made in the Court of Appeals, paints a picture which the respondent respectfully submits is distorted. The petitioner's statement contains almost no quotations from the evidence except, on pages 7 and 8, some quotations from one of the exhibits. These quotations are incomplete and out of context and therefore misleading. The respondent submits the following as a factual rather than an argumentative summary of the pertinent facts.

2. The Parties and the Background

General Motors in 1960 manufactured a Euclid C-6 Crawler Tractor which was sold to a dealer and resold to a leasing company and which, in Octboer 1960, was being used by the lessee, Blythe Brothers, on a road grading job on an interstate highway near Anderson, South Carolina.

The petitioner, Alexander L. Brown, a resident of North Carolina, was employed by Charlotte Equipment Company as a maintenance and lubrication mechanic. On November 10, 1960, he was injured while working about the crawler tractor at Anderson, South Carolina. His employer's insurance carrier has paid and is still subject to paying workmen's compensation benefits under the North Carolina Workmen's Compensation Act (Vol. I, pp. 193-194).

3. THE EVIDENCE AS TO HOW THE PLAINTIFF WAS INJURED

The petitioner testified that he was working for Charlotte Equipment Company maintaining Blythe Brothers equipment on the highway grading job near Anderson, South Carolina on November 10, 1960; that it was dark and about eight o'clock at night; that he approached the Euclid C-6 crawler tractor with the idea of greasing it and that he could not recall any details of the accident. (Vol. I, pp. 19-20).

For a first-hand account of the accident we must look to the only other eyewitness, Robert A. Gulley. Gulley testified that he and Brown were trying to find a way to lubricate the *rear* universal joint on the drive shaft without going through the labor of taking up the floor boards (Vol. I, pp. 88-89, 91), which was the usual and easier method (Vol. I, pp. 131-132, 166, 201). Gulley further testified (Vol. I, pp. 54-55):

> "We started servicing the C-6 tractor; it was then after dark, and I had a trouble line [light] rigged . . . Mr. Brown . . . was down on the track, to grease the joints on the main drive of the tractor. I was up on the tractor at the driver's seat, and . . . *he asked me to bump* the starter so he could see the grease fitting . . . (Emphasis added.)
>
> "So I bumped the starter, and when I did, the

> tractor started up, and he was sitting down on the track, with his legs down between the track and the machine; well, when the engine started, it was in reverse gear, and it pulled him back underneath the ledge that sticks out over the track, which is about, I'd say, ten inches, I don't know exactly how much it is, but I'd say it is approximately ten inches above that; well, it pulled him back underneath the track, and I saw what was going on, and I reached over and pushed the forward-reverse lever in the forward position, and when I saw that he cleared this ledge, well, I cut the tractor off . . ."

Gulley further testified that he was working in the dark (Vol. I, p. 54); that he could not see what position the controls were in (Vol. I, p. 68); that he did not change any of the controls before starting the engine (Vol. I, p. 68); that he had never had any instruction on how to operate this new unit (Vol. I, pp. 74, 79); that he *did not check to see the position of the controls* (Vol. I, pp. 84-85); that he did not pay any attention to their position (Vol. I, p. 92); and just assumed the unit was not in gear (Vol. I, p. 97) and that the throttle was off (Vol. 1, p. 98). [1]

Charles L. Knight, service representative for General Motors, was called on and made and reported on a check of the machine a week or so after the accident. The petitioner introduced part of his report, which read as follows (Vol. I, p. 192):

> "I have checked out and determined that there are no malfunctions in this unit's normal starting system. For example, with the range selector lever in neutral,

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[1] It is noteworthy that the jury found Gulley negligent by its answer to the fifth issue, Vol. I, p. 297.

with throttle wide open and the directional lever in either forward or reverse, the unit may be started without any danger of its moving. Furthermore, the range selector on this unit is equipped with a shield which allows the starter button to be completely exposed *only* in neutral. Although the starter button could be pressed and the unit started in any range, it would be with some difficulty and rather awkward. All of the facts point to human error and/or negligence as being the cause of this accident."

Thus matters stood for nearly three years, until, on August 20, 1963, the petitioner filed this suit against General Motors. He also filed a separate suit (which is still pending) in Superior Court of Rowan County, North Carolina against Blythe Brothers Company (Vol. I, pp. 324-9), alleging that:

> "The said machine would not have started in gear nor would it have moved nor would it have started at all, if it had been properly parked and secured for the day by the defendant [Blythe Brothers] and its employees and agents." (Vol. I, pp. 50, 326).

4. Description and Operation of the Euclid C-6 Crawler Tractor

The Euclid C-6 tractor is a crawler type tractor with endless treads on each side and weighs over 40,000 pounds. There was a bulldozer blade in front, with a cable to raise and lower the blade (Vol. I, p. 12). There were both headlights and a dash light (Vol. I, pp. 162, 172-173).

The C-6 has an automatic transmission with no conventional clutch. It has a six cylinder diesel engine (Vol. I, p. 94) with no spark plugs, which means that the fuel mixture in the cylinder is ignited by the heat of compression rather than by an electric spark plug (Vol. I, pp. 31,

94). The engine turns a drive shaft about 3 1/2 feet long (Vol. I, p. 88), which operates an automatic transmission behind and below the driver's seat. There are two universal joints on this drive shaft (Vol. I, pp. 88-89). The transmission turns the drive axles which make the tractor crawl on its endless tracks. The diesel engine starts more readily when warm (Vol. I, pp. 30-31, 94, 108). This was fully known to Gulley and to petitioner Brown, who had had seven months of training in diesel engines (Vol. I, p. 10). Gulley knew this engine was still warm (Vol. I, p. 68).

In this brief are six labeled photographs illustrating the controls on the tractor. The photographs are reproductions of trial exhibits. The labels and comments have been added for clarity.

The *Starter Button* or switch is mounted on a bracket under the cowling in front of and below the operator's left knee. The operator can see the starter button when the *Range Selector Lever* is in neutral, but he cannot see the button when the Range Selector Lever is in gear (Vol. I, pp. 14, 17), because the starter switch is then covered by a heavy metal *Shield or Mechanical Block* which is mounted on and pivots forward and backward with the Range Selector Lever (Vol. I, p. 17). When the *Throttle* is "ON" the engine will start in any gear *if* the operator reaches under the metal shield and presses the starter switch. (Vol. I, pp. 151-153).

The *Range Selector Lever* is the lever used to control the speed of the tractor. When the lever is pushed all the way forward, the gears will be in neutral, and the starter switch will be exposed to the operator's view. When it is pulled back to the first or "1" stop, the tractor is *in first gear,* and *the starter switch is concealed from the operator's view* by the mechanical block or metal shield on the Range

Selector Lever (Vol. I, pp. 14, 17-18, 150)[2]. It is also concealed when the lever is pulled back to second and third gear positions.

Although there is some conflict in the testimony, it is virtually impossible to push or "bump" the starter button in any gear other than neutral without the operator's finger or thumb coming in contact with the mechanical block or shield (Vol. I, pp. 104, 123, 139, 150, 176-7). In first gear, the clearance between the shield and the starter button by actual measurement is no more than 1/8 inch to 1/4 inch (Vol. I, p. 176), which means the thumb or finger has to be squeezed or forced between the button and shield (Vol. I, p. 177). This was amply illustrated by petitioner's witness Gulley during a jury view at the trial when he was requested to put the range selector lever in first gear and then attempt to put his thumb on the starter button. When he did so, he had to insert his thumb up under the shield, and his thumb was in contact with the shield (Vol. I, p. 139).

The *Throttle Control Lever* shuts the engine off when pulled all the way back (Vol. I, p. 36). This lever must be pushed *forward* to start the engine (Vol. I, p. 173). If it is in the "OFF" or rear position the engine will not start (Vol. I, p. 149).

The *Forward-Reverse Lever* controls direction of travel. When this lever is pushed forward, the tractor goes forward. When it is pulled back the tractor goes backward.

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[2] In this connection, petitioner has reproduced two photographs at pages 14 and 15 of the petition, by which an attempt is made to infer that the mechanical block or shield does not adequately cover the starter button when the range selector lever is in first gear. These photographs were taken from a position *below the operator's seat* looking upward and are hardly fair representations of the true situation as the witness Gulley admitted (Vol. I, pp. 81-83).

When it is in the middle or neutral position, the tractor is out of gear and won't move (Vol. I, pp. 113-114, 135).

There are two *Foot Brakes;* the left one stops the left tread and the right one stops the right tread. Each brake has a lock on the floorboard and can be locked on (Vol. I, p. 218).

Steering is accomplished by pulling back on the left and right Steering Clutches (Vol. I, p. 6, Exhibit #4, Operator's Manual, p. 8). Pulling back on the left steering clutch, for example, retards or stops the drive wheels on the left side and retards or stops the left track, and the unit turns by pivoting about the left track.

Prior C-6 models had an electric switch (micro-switch) to prevent unintended starting in gear. The micro-switch was mounted under the cowl in front of the range selector lever and was actuated by it. The 1960 shield or mechanical block was also designed to prevent unintentional starting in gear. It was more durable and reliable (Vol. I, p. 236) and harder to by-pass (Vol. I, p. 169) than the old micro-switch. However, *neither Gulley* (Vol. I, p. 79) *nor Brown* (Vol. I, p. 37) *had ever seen a C-6 with a micro-switch,* while Roy Stevens, the C-6 operator, and Crowell Morgan, the head mechanic, who *had* seen previous models, thoroughly understood how both models operated (Vol. I, pp. 112, 120-121, 123).

Proper stopping and parking procedures call for the controls to be left as follows (Vol. I, pp. 126, 128, 218):

Throttle—*Off* (Vol. I, p. 126).

Range Selector Lever—*In Neutral* (Vol. I, p. 218).

Brakes—*Locked on* (Vol. I, p. 218).

Bulldozer Blade—*Resting on Ground* (Vol. I, p. 218).

According to the evidence, the tractor could *not* have

started as Gulley claimed and moved backward unless *all* the following conditions occurred: [3]

(1) The left brake was off (Vol. I, pp. 155-156);

(2) The left steering lever was released (See Operator's Handbook, p. 12);

(3) The forward-reverse lever was in reverse (Vol. I, pp. 155-156);

(4) The throttle was "ON" (Vol. I, p. 155);

(5) The range selector was in gear with the starter button covered by the mechanical block or shield (Vol. I, pp. 155-156); and

(6) The starter button was pressed—*intentionally*—by someone reaching under the shield. (Vol. I, p. 156).

Gulley testified that he made no check whatever as to the position of the controls and never saw Brown make any check that night (Vol. I, pp. 84-85, 105). He said that he just pressed the starter, *assuming* the tractor was not in gear (Vol. I, pp. 89, 97, 99) and that the throttle was off (Vol. I, pp. 89, 97, 99).

No testimony, expert or otherwise, was offered to show that the design of the unit was unsafe.

No evidence was offered and no contention was made that the unit was not operating as it was designed to operate.

It was testified to and stipulated that the controls were

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[3] Under these circumstances and with the engine warm, there would be a time lag of three to six seconds before the machine would move at all after the engine started up (Vol. I, pp. 174, 204-5). But if the engine was already running and the range selector lever was then shifted from neutral into first or any other gear, the machine would move immediately (Vol. I, pp. 174-5).

operating as designed by General Motors (Vol. I, pp. 112, 215).

There is no evidence that the unit was defective in operation or that there was any malfunction of any part of it.

5. THE TEXT OF THE OPERATOR'S MANUAL, INCLUDING THE ALLEGED WARRANTY

General Motors published an Operator's Handbook (Vol. I, p. 5, Exhibit #4), and a Maintenance Manual (Vol. I, p. 5, Exhibit #5). *Neither Gulley nor Brown had ever seen either publication* (Vol. I, p. 74) *nor had the contents been communicated to them,* nor was their conduct influenced by them; and they therefore appear to have nothing to do with the case. Among the various advices, descriptions and warnings in the Operator's Handbook were the following (Vol. I, pp. 217-220):

PAGE 8 (describing the controls):

"1. Transmission Range Selector — Permits the operator to select the proper speed range for the prevailing work conditions. The lever MUST be in neutral in order to start the engine."

PAGE 11 "Starting and Stopping the Engine."

"NORMAL STARTING"

"For normal starting push the *throttle* lever forward to the center position to allow fuel oil to flow to the engine cylinders.

"Shift the transmission into neutral. A micro switch *or a mechanical block* on the range selector control lever does not permit the starter switch to operate unless the lever is in neutral." [4] (Emphasis added).

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[4] Petitioner, in quoting a part of this paragraph, has always omitted the all-important first sentence.

PAGE 12 "Stopping the Engine" (Vol. I, p. 218).

"1. Pull both steering levers all the way rearward (toward the operator) to stop the tractor. After the tractor stops, release the steering levers to release the brakes. The brake pedals can also be used to apply the brakes. Lock the brake pedals in the applied position.

"2. Shift the range selector lever into the neutral position. It is necessary to move the neutral block lever to permit the range selector lever to go into neutral.

"3. Pull the throttle lever back (toward the operator) against the stop. Move the stop lever to the right and then pull the throttle lever back to the 'OFF' position."

PAGE 13 under the caption "PARKING THE TRACTOR", is a diagram showing the throttle should be left in the "Off" or "Stop" position. Paragraph 2 in part reads:

"Be sure both brake pedals are depressed and locked in the applied position . . . (Vol. I, p. 218).

Paragraph 5 reads:

"5. If the tractor is equipped with a dozer blade or ripper be sure they are lowered and are resting on the ground."

PAGE 17: "TRANSMISSION SHIFTING"

* * *

"During normal operation, the transmission range selector lever MUST be left in gear and the forward-reverse lever shifted into neutral when the tractor is brought to a temporary stop."

* * *

PAGE 18: "TRANSMISSION OPERATING HINTS"

[i. e., while the machine is in operation]

"Do not shift range selector to neutral *except when starting engine.* Leave it in gear at all other times."

PAGE 25: There is a cartoon showing a man being hurt by the left track of the crawler, with a caption:

"Make sure no one is working on unit before *starting* engine or moving tractor."

PAGE 26: Under an appropriate cartoon:

"Never allow passengers to ride anywhere on tractor except next to operator on platform."

PAGE 26:

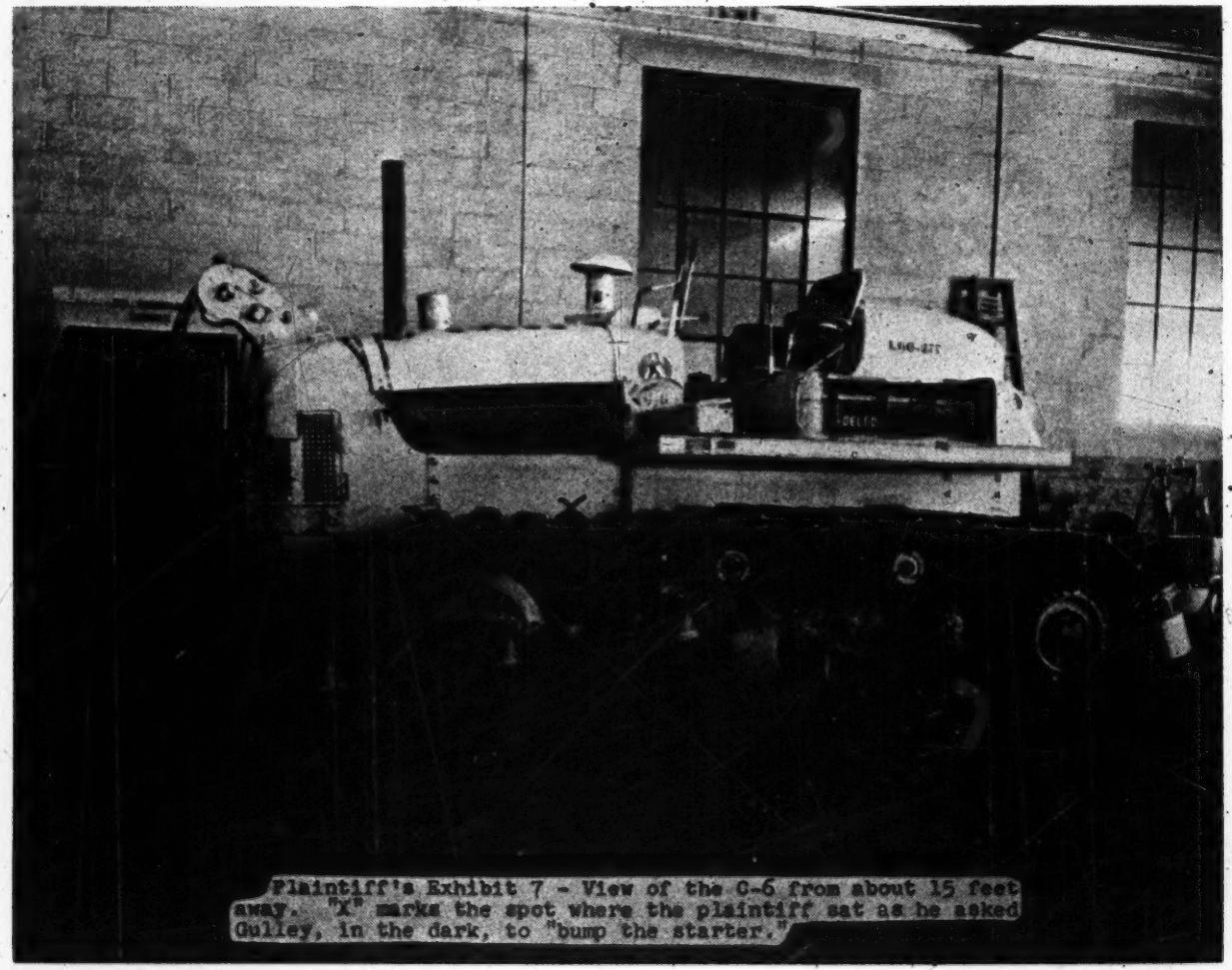
"Set parking brakes when unit is not in operation . . ." (Vol. I, p. 220).

"You bet your life every time you take a chance." (Vol. I, p. 220).

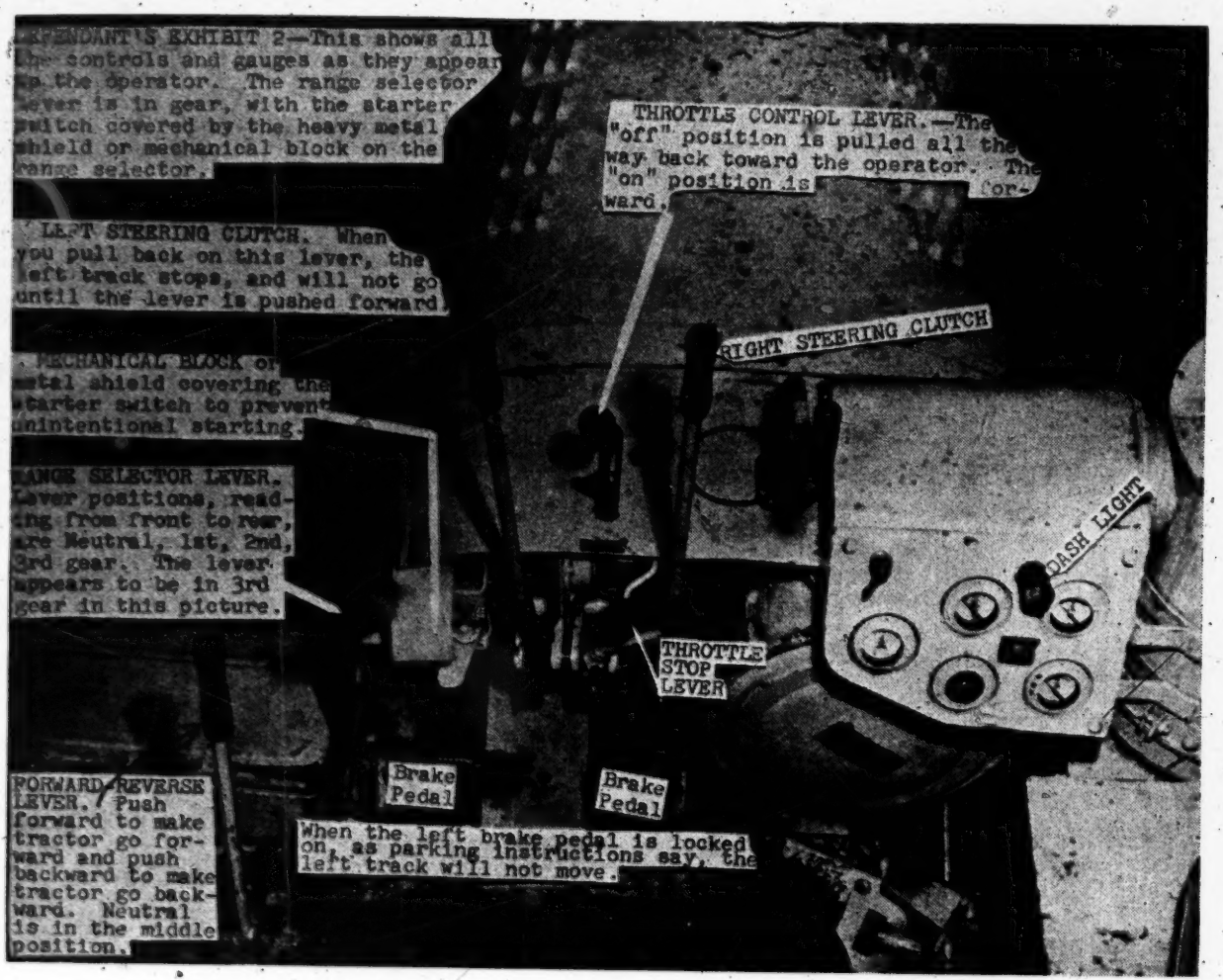
6. THE QUESTION OF COMMUNICATION AND RELEVANCE OF THE ALLEGED WARRANTY; THE QUESTION OF PROXIMATE CAUSE

The manuals or handbooks were sent by General Motors to the purchaser, Mitchell Distributing Company, a day or so after the C-6 was delivered (Vol. I, p. 5). There is no evidence that they were read before the sale or that they induced any sale or lease or were part of a contract of sale or lease.

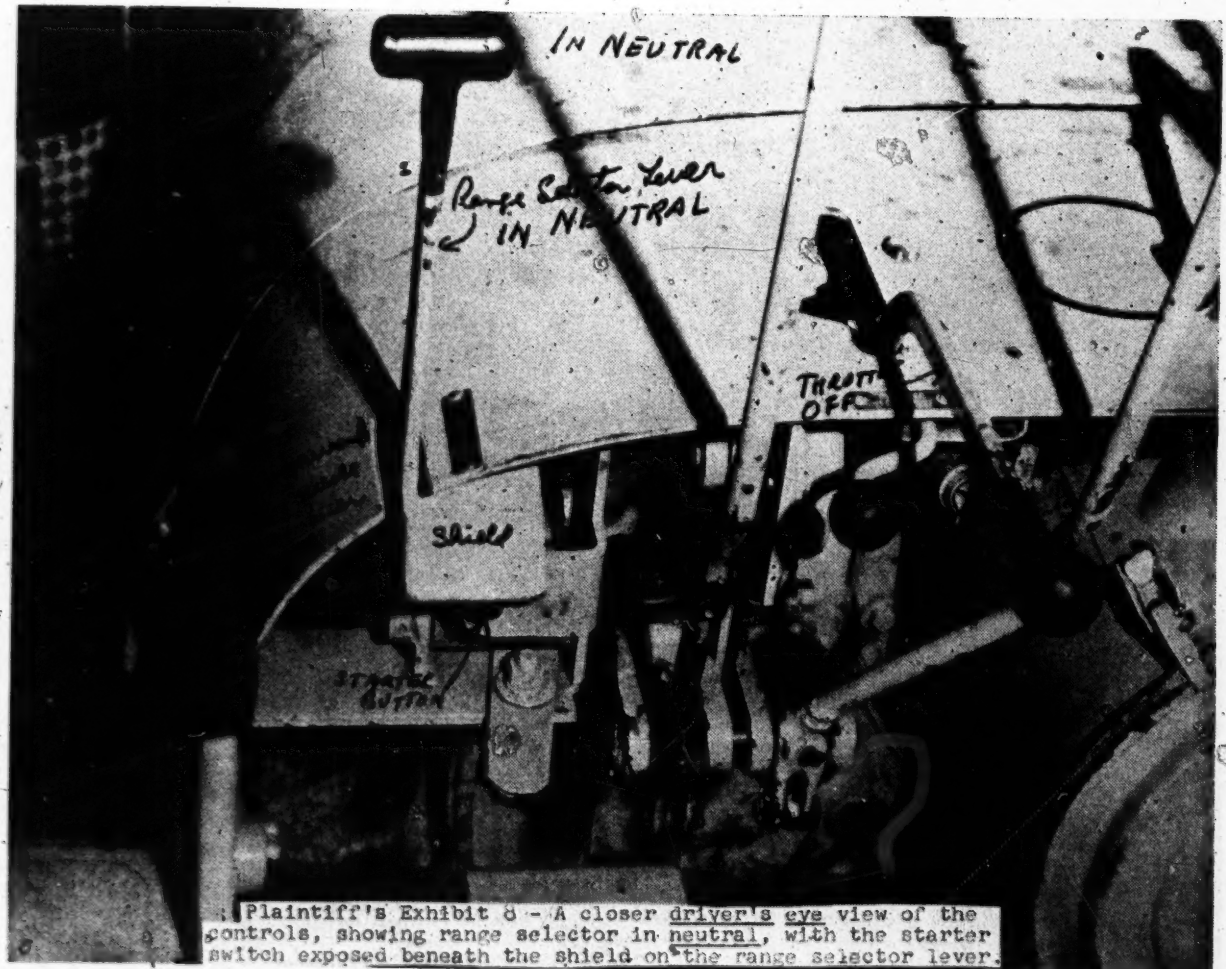
Crowell E. Morgan, petitioner's witness, a mechanic and "trouble shooter" for petitioner's employer, (Vol. I, p. 161) was the only witness who seems to have seen the manuals before the accident. He testified that he did not know when the manuals were received (Vol. I, p. 164), but that he did not see them until after he first saw the tractor on the job (Vol. I, p. 166) at Gastonia some time before the accident (Vol. I, p. 166). He did not say a word in his 34 pages of testimony (Vol. I, pp. 160-189, 221-224)



Plaintiff's Exhibit 7 - View of the C-6 from about 15 feet away. "X" marks the spot where the plaintiff sat as he asked Gulley, in the dark, to "bump the starter."


RIGHT STEERING CLUTCH
DASH LIGHT
THROTTLE STOP LEVER
Brake Pedal
Brake Pedal

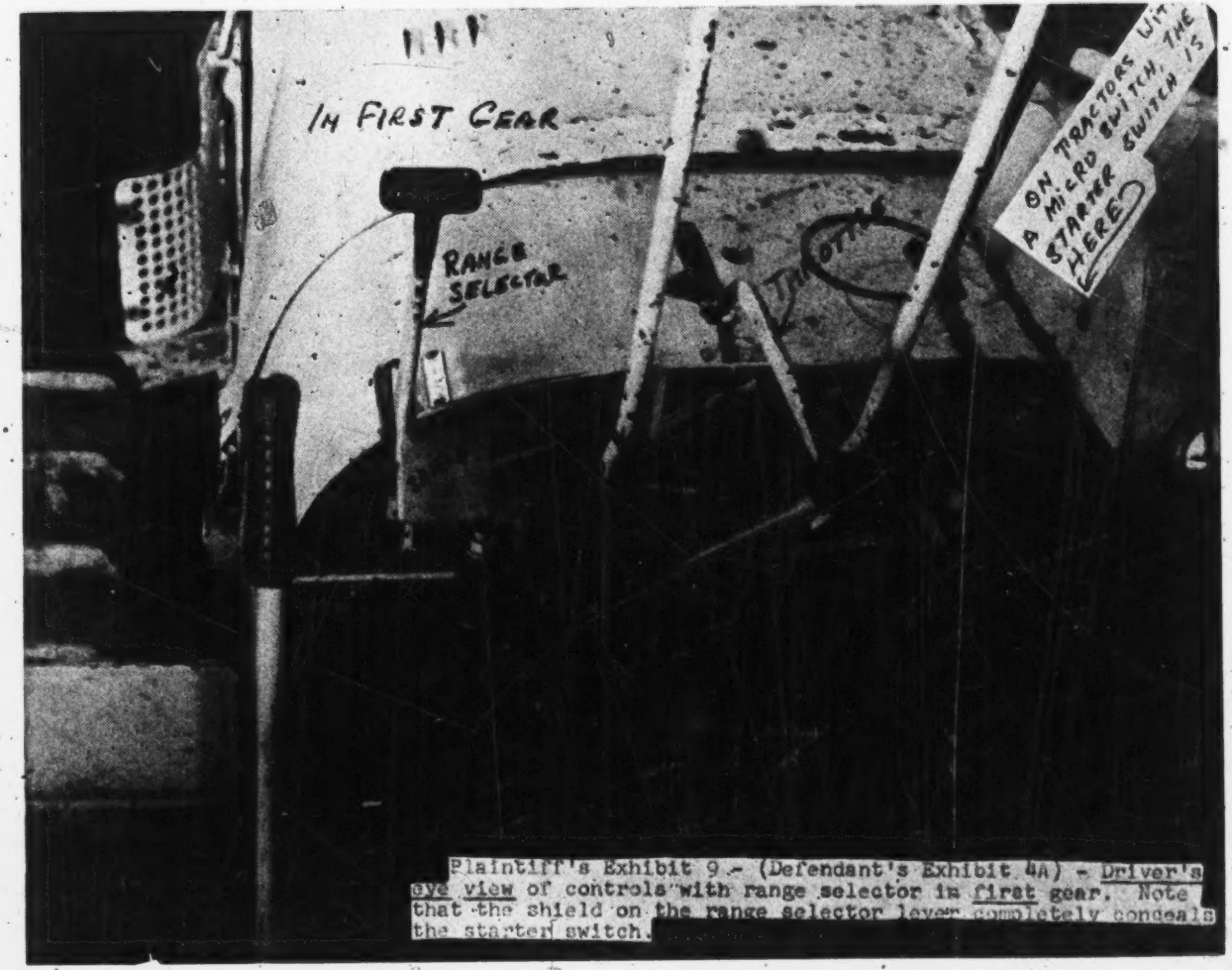
12B



Plaintiff's Exhibit 8 - A closer driver's eye view of the controls, showing range selector in neutral, with the starter switch exposed beneath the shield on the range selector lever.

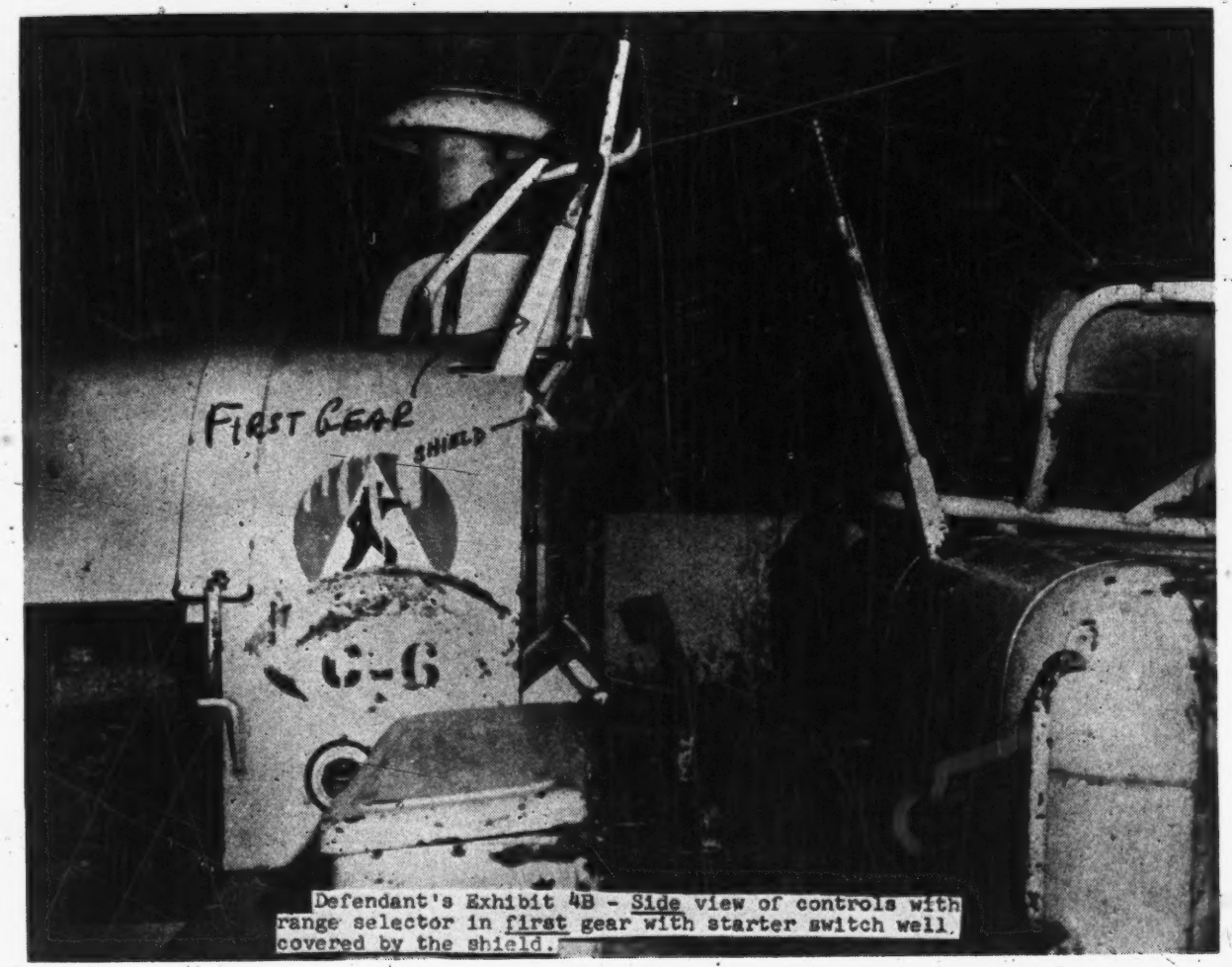
GEAR SELECTOR
MECHANICAL BLOCK OR SHIELD
STARTER BUTTON
NEUTRAL
G-6
RIGHT BRAKE LOCK
LEFT BRAKE LOCK

the range selector in neutral. The starter switch is visible.

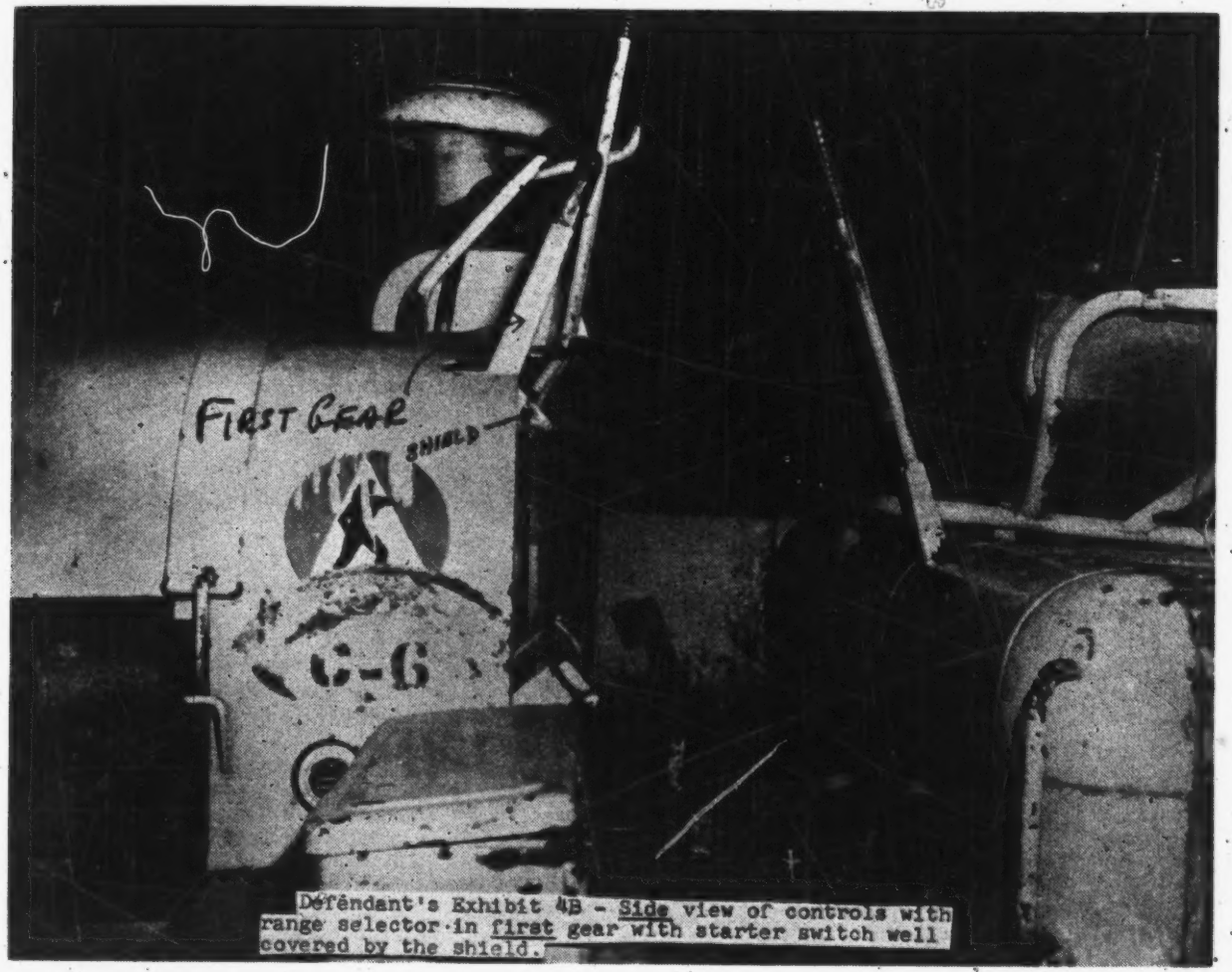


Plaintiff's Exhibit 9 - (Defendant's Exhibit 4A) - Driver's eye view of controls with range selector in first gear. Note that the shield on the range selector lever completely conceals the starter switch.

12E



Defendant's Exhibit 4B - Side view of controls with range selector in first gear with starter switch well covered by the shield.



Defendant's Exhibit 4B - Side view of controls with range selector in first gear with starter switch well covered by the shield.

12F

about the contents of the manuals or about any reliance on them. He said the tractor operates now just as it always has (Vol. I, pp. 175, 189); that if the unit would not start in gear there would be no point in having a shield (Vol. I, p. 176) over the starter button; that the shield or mechanical block is one type of neutral starting arrangement (Vol. I, pp. 168, 170) and the micro-switch, such as earlier models had, is another type (Vol. I, pp. 168, 170); that "if the switch and everything worked normally, it would not accidentally hit it, it would not start accidentally" (Vol. I, p. 186); and his testimony shows that he fully understood how the machine operated.

Morgan testified (Vol. I, p. 168) and demonstrated (Vol. I, p. 223) that the micro-switch on the older C-6 could be by-passed while sitting in the driver's seat with ease, and with only finger pressure (Vol. I, pp. 169-170), by anyone who set out to do so (Vol. I, pp. 168-169); and that all Euclid equipment, with or without automatic transmissions, could be started in gear (Vol. I, pp. 168-169) by anyone who disregarded the normal operating procedures.

Alexander Brown, the petitioner, (even though there is no evidence he ever saw or heard of the manuals before the accident) understood the operation of the tractor as it actually was. His testimony on direct examination is as follows (Vol. I, pp. 14, 17):

> "Yes, it had, starting left to right, there was a forward and reverse lever, it had a neutral in between the forward and reverse, and then left to right, next was your speed range lever, which had a neutral and one, two, three speed ranges on it; right under the shield there, it had a molded shield on the lever that *when the speed range lever was in neutral you press the starter, and it would start up, because the shield un-*

covered the button, and when in a sitting position the shield covered the button, and you couldn't hit the button with your thumb; that was the way I usually started it." (Emphasis added.) (p. 14).

* * *

"Q. Mr. Brown, from the operator's point of view, what happened when you pulled the range selector lever back towards the operator?

"A. Well, it engaged the automatic transmission in gear."

Q. *And from the operator's point of view, state whether or not with the machine in gear it was possible to see the starter button?*

"A. *Well, I never did see it, sitting in the operator's seat, I never saw the starter button when it was in gear.*" (Emphasis added.) (p. 17).

Robert A. Gulley had never had any instruction about the unit. "I didn't have a manual or a handbook or anything on the tractor" (Vol. I, p. 74). He had "never seen any of the manuals or handbooks or any kind of operating instructions on the tractor." (Vol. I, pp. 74, 80). He had never serviced or seen another C-6 (Vol. I, p. 79).

What went on in Gulley's mind is best shown by his revealing statements (Vol. I, pp. 89-90, 98) that he

> "figured, with the blade resting on the ground, and with it parked there, it would not be in gear" (pp. 89-90), "and that the throttle would be off." (p. 98).

These statements show that he knew the unit should not be started except in neutral; his other testimony (Vol. I, p. 103) shows that he knew the shield on the range selector lever was there for a protective cover over the starter button, and (Vol. I, p. 103) that if the machine would not

start in gear there was no purpose in having the shield over the starter button. He demonstrated on the machine itself that the shield covers the starter button from the operator's view (Vol. I, p. 135) when the machine is in gear, and that in first gear, when he touched the starter button, his thumb was in contact with the shield. (Vol. I, p. 139).

Roy Stevens testified that he had been the C-6 operator on the day of the accident (Vol. I, pp. 109-110); that he knew that you could start the machine in gear by reaching underneath the shield and pressing the starter switch (Vol. I, p. 121), but that he did not report this to anyone (Vol. I, p. 111), because

> ". . . it just looked to me like that was the way the machine was built, I didn't see any reason to say anything about it." (Vol. I, p. 112).

Stevens had previously operated a C-6 on which the neutral starting device was a micro-switch (Vol. I, p. 121); before the accident he was aware the C-6 in question had a different type of starter (Vol. I, p. 121); he knew the purpose of the shield (Vol. I, p. 121); he knew there was no purpose in having the shield unless the machine would start in gear (Vol. I, p. 121).

Stacey Williamson (Vol. I, p. 140), the head mechanic from whom Brown and Gulley took their instructions (Vol. I, p. 147), testified that certain Euclid machines had a neutral starting device called a micro-switch (Vol. I, pp. 145-146); that certain others, the C-6 and TC-12, had been changed so that the neutral starting device was a mechanical block or shield (Vol. I, pp. 145-146); that the purpose of both systems was to prevent accidental starting in gear (Vol. I, p. 153); that all neutral start systems can be by-passed with very little trouble (Vol. I, p. 153); that he knew the shield could be by-passed by reaching under

it and pressing the starter button, even with the machine in gear (Vol. I, p. 155). Williamson, who had spent his working life as a mechanic (Vol. I, p. 141) testified that all his experience with C-6s had been with tractors whose neutral starting was provided by a mechanical block and that (Vol. I, p. 152): "I've never seen a C-6 with a micro switch on it . . ."

Guy Faggart (Vol. I, pp. 199-213), testified that he was familiar in November 1960 with the C-6 (Vol. I, p. 200); *that any time you "bump" the starter the engine may crank up, especially if it is warm* (Vol. I, p. 203); that the purpose of the shield was to cover the starter to prevent accidental starting in gear (Vol. I, pp. 205-206); that the customary method of greasing the rear universal was to remove the floor board (Vol. I, p. 201).

There is absolutely no evidence of any kind to show that the manuals or handbooks played any part in inducing a sale or lease, or in influencing the conduct of anyone connected with the accident.

7. The Experience of the Petitioner Brown

The petitioner in 1960 was 43 years old; had attended Davidson College three years (Vol. I, p. 8); had had considerable technical experience in military service, including combat demolition training (Vol. I, p. 9); had operated a dairy farm for years.

In 1959 he got out of the dairy business. He attended a professional truck driver's school in Raleigh at N. C. State College (Vol. I, p. 10). He then spent seven months of full time training in diesel engines, heavy transmissions and welding at the Nashville, Tennessee, Auto Diesel School (Vol. I, p. 10). He worked several months as a maintenance man on Euclid rock trucks for W. E. Graham & Sons at Winston-Salem, (Vol. I, p. 31). He worked as a

mechanic for Miller Equipment Company, repairing tractor-trailers (Vol. I, p. 32). He came to Charlotte Equipment Company in May or June, 1960 (Vol. I, p. 11), and worked as a heavy equipment mechanic and welder for them until November 10, 1960.

Brown had operated the C-6 in question (Vol. I, p. 13); he "usually" started it with the gear in neutral (Vol. I, p. 14); he had actually been the one who installed the bulldozer blade cable on it (Vol. I, p. 13) in Gastonia, two months earlier. He had helped start the various machines each morning at Anderson (Vol. I, p. 39).

Brown and Gulley both knew that a warm Diesel engine may and often does start immediately if you touch the starter button, and that Diesels don't have conventional spark plugs (Vol. I, pp. 31, 95, 108).

ARGUMENT

(A) THERE ARE NO SPECIAL OR IMPORTANT REASONS PRESENTED FOR GRANTING A REVIEW ON WRIT OF CERTIORARI

The Court of Appeals simply held *as a matter of law* that the evidence was insufficient to establish liability, either on warranty or in negligence, and that respondent's motion for a directed verdict, which was made pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, should have been granted.

Petitioner's argument is that he has been deprived of his right to a jury trial as guaranteed by the Seventh Amendment because the Court of Appeals allegedly undertook "to resolve disputed issues of fact." This is an effort to contrive a constitutional question where none exists,

since the judicial resolution of any issue as a matter of law would thereby deprive every litigant of the right to a jury trial. Thus, no constitutional question is presented. The petitioner had a jury trial. The jury found no negligence on the part of the respondent (Vol. I, pp. 285, 296), but returned a verdict for petitioner on the warranty issue (Vol. I, pp. 285, 296) pursuant to the District Court's peremptory instruction (Vol. I, p. 256, 284).

The Court of Appeals interpreted the law of the various states involved, and applied that law to the evidence in reaching its result. This Court ordinarily accepts the interpretation of local law by the Court of Appeals. *Regan v. Merchant's Transfer and Warehouse Co.*, 337 U. S. 530, 93 L.Ed. 1520, 69 S. Ct. 1233.

Moreover, there is no important or unusual question involved here. This is a relatively simple personal injury "products liability" case, and while fully recognizing that the granting or denying of the petition is in the Court's discretion, we do not believe any reasons for granting a writ of certiorari have been shown by petitioner in accordance with Rule 19 of the Revised Rules of the Supreme Court or otherwise.

(B) THE EVIDENCE WAS INSUFFICIENT IN LAW TO ESTABLISH LIABILITY IN NEGLIGENCE

We respectfully submit that the Court of Appeals was correct in holding that the evidence was insufficient to establish any actionable negligence on the part of the respondent.

There was absolutely no evidence, expert or otherwise, that the mechanical block or shield type of starter mechanism on the C-6 was negligently designed. The fact that the mechanical block or shield was a different type of neutral starting arrangement from that used on some other

earth-moving equipment or on earlier C-6's is certainly no evidence of a negligent design. See *Marker v. Universal Oil Products Co.*, 250 F. 2d 603 (10 Cir. 1957). It was stipulated that the C-6 was working entirely in accordance with its design, and there was no evidence whatever of any defect in any part of the C-6 or of negligence in its manufacture or assembly.

Petitioner's apparent contention that a warning should have been given in the Operator's Manual of a change from the micro-switch to the mechanical block is without merit. If a warning had been given, it would have done neither petitioner nor Gulley any good because neither ever saw or heard of the Manuals before the accident. Their employer never communicated the contents of the Manuals to them. Of course, the mechanical block or shield was the best "warning" that could possibly be asked for. This was recognized by numerous witnesses. Its purpose was obvious.

It is agreed that South Carolina law applies on the negligence phase of the case, and the Fourth Circuit has recognized that the doctrine of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, applies in South Carolina. See *Ford Motor Co. v. McDavid*, 259 F. 2d 261 (4 Cir. 1958), *cert. den.* 358 U. S. 908. But, the Court said in footnote 4 at p. 265:

> "In South Carolina, a manufacturer of a chattel is not liable to a remote vendee for loss caused by a defect which does not make the chattel dangerous in its normal use."

But here there was not a defect of any sort in the C-6. Certainly it was not dangerous in its normal use, and there is no evidence of anyone ever having been injured on or about a C-6 before or since the accident. In fact, General Motors had never received a complaint from anyone about the starting mechanism on the C-6's (Vol. I, p. 217).

In *Pontifex v. Sears, Roebuck & Company,* 226 F. 2d 909 (4th Cir. Va. 1955), the plaintiff was injured when she was struck in the eye by a rope pulled to start the gasoline engine of a lawn mower. A directed verdict in the District Court was affirmed, *per curiam,* by the Fourth Circuit. The plaintiff complained of negligence in the design of the lawn mower in that the rope was not permanently attached to the spring recoil mechanism and that no warning was given of this fact and the inherent danger in it. The Fourth Circuit said:

> "We do not think . . . that it can be held to be negligence to sell an old model machine not equipped with a safety device of later models, and we find no evidence of negligence in the design or construction of the machine or of any need for warning or of any other negligence upon which a verdict for plaintiff could have been based."

Tuttle v. U. S. Slicing Co., 335 F. 2d 63 (4th Cir. Va. 1964) was a negligence action where it was contended that a meat grinding machine was inherently dangerous and no warning of the danger had been given by the maker and seller to those who foreseeably would use it. In affirming summary judgment in favor of the manufacturer and seller, the Fourth Circuit held that the machine was not an inherently dangerous instrumentality, "especially as it was without structural or functional defect . . ." The grinder had originally been fitted with a protective grill which had been taken off, and the plaintiff got his hand caught in the machine. It also appeared the plaintiff had some familiarity with the machine.

We submit there is no evidence of actionable negligence on the part of the respondent and that the Court of Appeals was correct in its ruling.

(C) THE EVIDENCE WAS INSUFFICIENT IN LAW TO ESTABLISH LIABILITY ON WARRANTY.

Assuming, as did the Court of Appeals, that the C-6 tractor in question was sold in Ohio on August 18, 1960, then we look to the law of Ohio on warranty. [5] In 1960, the Uniform Sales Law was in effect in Ohio, and Sec. 1315.13 of the Ohio Revised Code defined an express warranty as:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to *induce* the buyer to purchase the goods, *and* if the buyer purchases the goods *relying* thereon . . ." (Emphasis added.)

In the celebrated case of *Rogers v. Toni Home Permanent Co.*, 147 N. E. 2d 612 (Ohio St. 1958), the Court said:

> ". . . an express warranty may be defined as an affirmation of fact by the seller of a product or commodity to induce the purchase thereof *and* on which affirmation the buyer relies in making the purchase." (Emphasis added.)

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[5] At the trial no evidence was presented as to just where the sale of the C-6 took place. The evidence was susceptible of the conclusion that the sale took place in North Carolina (Vol. I, p. 3, 321). If so, privity of contract between petitioner and respondent would have to be shown to establish liability in warranty, express or implied. See *Murray v. Benson Aircraft Corp.*, 259 N. C. 638, 131 S. E. 2d 367 (1963); *Perfecting Service Co. v. Products Development and Sales Co.*, 261 N. C. 660, 136 S. E. 2d 56 (1964); *Terry v. Double Cola Bottling Co., Inc.*, 263 N. C. 1, 138 S. E. 2d 753 (1964).

If the sale was consummated in Ohio on August 18, 1960, as petitioner now contends, then, the three year statute of limitations applicable in North Carolina would have run since this suit was not instituted until August 20, 1963 (Vol. I, p. 288), and petitioner's warranty action would be barred. See N. C. G. S. § 1-52(1) (apdx. p. 27) and *Thurston Motor Lines, Inc. v. General Motors Corp.*, 258 N. C. 323, 128 S. E. 2d 413 (1962).

As was said by the Court of Appeals (Opinion, p. 7): "The statements here are not representations to induce the buying of the machine. Merely 'advisory', they only instruct the operator on how the machine *should* be operated." Obviously they did not *induce* the purchase of the C-6 and there is no evidence that they did. Thus, the Court of Appeals correctly held, as a matter of law, that there was no express warranty.

Moreover, since neither Gulley nor the petitioner Brown ever saw or heard of the Operator's Handbook prior to the accident, neither could have relied upon the statements. There is no evidence that anyone else relied on them either.

In *Yount v. Positive Safety Manufacturing Co.*, 319 F. 2d 324 (6 Cir. 1963) it was said:

> ". . . this is an Ohio case, and, as to express warranty, reliance thereon is specifically required by Ohio Revised Code, Section 1315.13 of the Uniform Sales Law, which provides that an express warranty arises only 'if the buyer purchases the goods relying thereon***'.
>
> "With regard to an implied warranty of reasonable fitness, reliance is required by Ohio Revised Code, Section 1315.16 of the Uniform Sales Law, which provides that an implied warranty arises only when 'it appears that the buyer relies on the seller's skill or judgment.' "

Although this case was tried solely on an express warranty theory, petitioner, on appeal to the Court of Appeals, raised the question of an implied warranty. But there is no evidence of a breach of any implied warranty. There was no defect in the C-6 of any kind. It was operat-

ing as it was designed to operate, and there was no evidence of any defective design.

As to the doctrine of strict tort liability, it does not apply since there was no evidence of any defect, and the case was not tried on that theory.

We submit that the Court of Appeals was correct in holding that the evidence was insufficient as a matter of law to establish liability on warranty.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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UNIFORM SALES LAW

(Effective in Ohio until July 1, 1962)

OHIO REVISED CODE:

§ 1315.13. Express Warranty (G. C. § 8392). Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

§ 1315.16. Sale in Which Warranty is Implied (G. C. § 8395). Subject to § 1315.01 to 1315.76, inclusive, of the revised Code and any law applicable thereto, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(A) When the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he is the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.

(B) When the goods are bought by description from a seller who deals in goods of that description, whether he is the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality.

(C) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(D) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(E) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the useage of trade.

(F) An express warranty or condition does not negative a warranty or condition implied under such sections unless inconsistent therewith.

NORTH CAROLINA GENERAL STATUTES

North Carolina Civil Procedure. Ch. 1, Sub-Ch. II, Limitations, Art. 5.

The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this article.

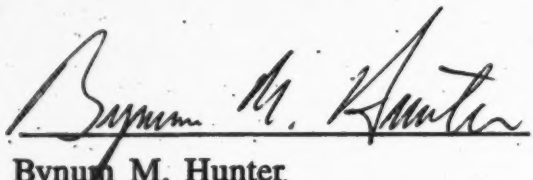
* * *

N. C. G. S. 1-52. *Three Years* — Within three years an action—

1. Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections.

PROOF OF SERVICE

I, Bynum M. Hunter, one of the attorneys for the respondent, General Motors Corporation, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 12th day of July, 1966, I served copies of the foregoing Brief for Respondent in Opposition on the attorneys for the petitioner by mailing copies in duly addressed envelopes, with first class postage prepaid, as follows: Wm. Clarence Kluttz, Esq. and Lewis P. Hamlin, Jr., Esq., Wachovia Bank Building, P. O. Box 58, Salisbury, North Carolina 28144.



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